State of Colorado

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Department of Personnel & Administration

State Personnel Board
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AGENDA (AMENDED)
PUBLIC BOARD MEETING
October 19, 2004

A public meeting of the State Personnel Board will be held on **Tuesday, October 19, 2004, at the Department of Public Health and Environment, 4300 Cherry Creek Drive South, Denver, Colorado 80246.** The public meeting will commence at 9:00 a.m.

Reasonable accommodation will be provided **upon request** for persons with disabilities. If you are a person with a disability who requires an accommodation to participate in this meeting, please notify Board staff at 303-764-1472 by October 14, 2004.

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I. REQUESTS FOR RESIDENCY WAIVERS

A. October 1, 2004 Report on Residency Waivers

Reports are informational only; no action is required.

II. PENDING MATTERS

There are no pending matters before the State Personnel Board this month.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

A. James Masse v. Department of Corrections, State Personnel Board case number 2003B077.

The Board, at its regularly schedule meeting held on June 15, 2004, reviewed the Initial Decision issued by the Administrative Law Judge (ALJ) in this matter on May 10, 2004. The ALJ found that Respondent's termination of Complainant's employment was not arbitrary, capricious or contrary to law, and ordered that Respondent's action is affirmed. While no formal action was required nor taken relative to the Initial Decision by the Board, certain scrivener's errors were noted in the Findings of Fact in the Initial Decision. On June 16, 2004, an Amended Initial Decision was issued by the ALJ.

On May 28, 2004, Complainant appealed the Initial Decision, arguing that the investigation was solely focused on gathering evidence against Complainant, rather than

finding the truth, and several crucial witnesses were not interviewed during the investigation. In addition, Complainant challenges the factual basis of his termination and the unconstitutional use of Administration Regulation (AR) 1450-01, in the context of the events. Complainant further argues that DOC failed to follow its own internal investigation guidelines and should be required to reverse its action.

On August 16, 2004, Complainant filed his Opening Brief, asserting the following:

- During the termination process, DOC and the State Personnel Board subjected Complainant to "numerous and shocking deprivations of due process."
- DOC conducted an investigation that focused solely on gathering evidence against Complainant, instead of finding the truth, as several crucial witnesses were not interviewed.
- During the evidentiary hearing phase, denial of Complainant's due process rights continued in direct violation of the Rules of Professional Conduct, including when the original ALJ assigned to the case communicated and accepted employment with opposing counsel in the middle of the hearing.
- The subsequent ALJ assigned to the case abused his discretion by ignoring the law, previously entered orders, and his own orders.
- The Initial Decision "reaches its conclusions only by ignoring evidence and twisting and torturing the plain language and meaning of the law."
- DOC's failures include:
  - Due process requires adherence to strict standards when discharging employees. *Perry v. Sindermann*, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (U.S.Tex. 1972); *Vitarelli v. Seaton*, 359 U.S 535, 3 L.Ed.2d 1012, 79 S.Ct. 968 (1959); *Mazaleski v. Treusdell*, 183 U.S.App.D.C. 182, 562 F.2d 701 (D.C. Cir. 1977); *Shumate v. State Personnel Board*, 34 Colo.App. 393, 528 P.2d 404 (1974).
  - DOC ignored many of its own codified rules regulating investigations of employee misconduct, its Professional Standards Investigations, AR 1150-04; and its responsibilities under C.R.S. §24-50-125(1) and Board Rule R-6-9.
  - The appointing authority made no findings about which conduct was willful and no conclusions about which allegations against Complainant were sustained by a preponderance of evidence.
  - DOC treated Complainant like an inmate by failing to inform him about any aspects of the investigation until the December 20, 2002 letter from Atherton, in violation of the "as soon as practical" provision.
  - Neither the Inspector General nor appointing authority told Complainant that the "pretext telephone call" was a DOC interview by proxy; Complainant was not given any opportunity to review any part of it prior to a re-interview on November 11, 2002, and January 9, 2003.
  - When Complainant denied that he had attempted to influence any witnesses or persuade them not to testify, the appointing authority and investigator concluded Complainant was lying and did not bother to give him a chance to explain his statements.
  - DOC failed to interview several critical witnesses, including the owners of Rooster's, and independent witness Whitcher, whose affidavit contradicts Boehm's statements to authorities.
  - DOC acted arbitrarily and capriciously in failing to consider certain evidence. *Van de Vegt v. Board of Commissioners of Larimer County*, 55 P.2d 703, 705 (Colo. 1936).
  - DOC violated Complainant's constitutional right to be disciplined for cause. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994); *Alexander v. Department of Higher Education*; and *Michael R. High v. Department of Corrections*, State Personnel Board case number 2000B094.

  - DOC failed to demonstrate a nexus between the off-duty conduct of Complainant and a significant adverse impact on legitimate employer interests. *City of Colorado Springs v. Givan*, 897 P.2d 753, 760, Note 7 (Colo. 1995); AR 1450-01 IV (ZZ) (Staff Code of Conduct); and Board Rule R-6-9(2).
  - DOC terminated Complainant's sixteen years of service, "depriving him of his nearly vested retirement based on nothing more than fear and speculation."
  - Complainant's job description does not list compliance with DOC's Staff Code of Conduct as part of the job performance duties; therefore, Complainant did not fail to perform his job duties by violating this Code.
  - DOC's actions violated Colorado's Anti-discrimination Act, C.R.S. §24-34-402.5, prohibiting discharge for legal off-duty conduct.
- DOC's Deprivations of Procedural Due Process include:
  - The ALJ recommenced the hearing without having listened to the tapes and having reviewed the transcripts, in violation of his own order and those of the previous ALJs assigned to the case.
  - ALJ Worthington's conduct violated the Colorado Rules of Professional Responsibility 1.12, as did the AG's communication with her and continued representation of DOC; ALJ Norwood's decision to allow the AG to continue representation is a violation of C.R.S. §24-4-105(14a).
  - The lack of a transcription of opening statements deprived both parties of the opportunity to giving opening argument and thus both were deceived about how the remainder of the proceedings would be conducted.
  - The ALJ allowed DOC's most important witness, Sarah Hobby, to testify, ignoring the orders of the previous ALJs.
- Complainant requests that the Board find Complainant's termination arbitrary and capricious, and a deprivation of his due process rights; and that the Board overturn the Initial Decision of ALJ Norwood and reinstate Complainant, awarding him back pay, fees and costs, or remand the matter for a full and fair hearing.

On September 17, 2004, Respondent's filed its own Opening Brief, stating the following:

- Complainant violated DOC policy, engaged in conduct that was referred to the District Attorney for criminal prosecution, and tried to bribe and threaten a victim into dropping the criminal charges.
- Complainant had received previous corrective and disciplinary actions for alcohol consumption while driving a state vehicle, angry and abusive behavior for striking a co-worker, and criminal conviction of third-degree assault charges for striking his daughter. He also had been admonished by supervisors to correct this behavior and received anger management treatment.
- ARs are not regulations having the force and effect of law as those promulgated under the APA; rather, they are internal guidelines. The Board Rules, on the other hand, must be followed, including the notice of a pre-disciplinary meeting and the holding of a pre-disciplinary meeting, which DOC did.
- ALJ Norwood properly found that the tape recording wherein Complainant was attempting to bribe and threaten Boehm was not a DOC interview, and thus DOC did not violate AR 1150-04 (employee right to review previous statement prior to subsequent interview or re-interview).
- ALJ Worthington properly recused herself from any involvement on this case both as the ALJ and as an attorney with the AG's office. Once she accepted a position with the AG's office, she recused herself immediately, and Complainant does not suggest any other course of action.
- ALJ Worthington identified a potential conflict and removed herself; however, the allegation that Worthington violated Colorado Rule of Professional Responsibility 1.12 is unfounded and unsupported in law or fact.
- Worthington never represented DOC in this case, never filed an entry of appearance, never signed a single pleading, or appeared on behalf of DOC.

- The AG's office is statutorily authorized to represent all state departments, and thus properly continued to represent DOC in this case, although Complainant argued that no AG should represent DOC. *Davis v. State Board of Psychologist Examiners*, 791 P.2d 1198 (Colo.App. 1989*); Ranum v. Colorado Real Estate Commission* (Colo. App. 1985); *People ex Rel. Woodard v. Brown*, 770 P.2d 1373 (Colo. App. 1989); *Horwitz v. Colorado State Board of Medical Examiners*, 716 P.2d 131 (Colo.App. 1985); and *McCall v. District Court for Twenty-First Judicial District*, 783 P.2d 1223 (Colo. 1989).
- ALJ Norwood accorded Complainant a fair and impartial hearing, having read the transcript of testimony of the first two days of hearing in October 2003, and by allowing prehearing statements, a trial brief, closing statements, and testimony by Sarah Hobby.

Respondent requests that the Board affirm the ALJ, uphold the termination of Complainant's employment, and dismiss the appeal with prejudice.

On September 29, 2004, Complainant filed a Reply Brief, asserting that:

- Complainant was terminated without due process for actions he did not commit.
- Corrections to examples of "errors, inaccurate statements and scurrilous exaggerations" made by DOC:
  - Complainant was attacked and acted in self-defense; he did not physically assault the manager of Rooster's Bar, Boehm;
  - Boehm called Complainant and told him to come to the bar and he did not verbally abuse her;
  - Complainant did not go to Rooster's to physically confront Boehm;
  - Complainant walked past Whitcher and did not push his way into Boehm's office;
  - Complainant never refused Boehm's instructions, reacted only to her attack, used obscenities only after she attacked him, broke his glasses, verbally abused him by calling him a child abuser and the neglectful parent of a disabled son;
  - Complainant contacted Boehm, as he was told to do so by the Assistant D.A., did not threaten or attempt to bribe her, and did not attempt to influence her improperly so she would drop the charges. This call took place two week after the Court dismissed the charges.
- DOC was obligated to follow its own regulations; initially DOC declared that it is not required to follow its own regulations and Complainant deserved no constitutional considerations in any event.
- Complainant was supposedly terminated for failure to follow the DOC Staff Code of Conduct.
- However, due process of law requires strict adherence to certain standards in discharging employees. *Perry v. Sindermann*, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (U.S.Tex. 1972); *Vitarelli v. Seaton*, 359 U.S 535, 3 L.Ed.2d 1012, 79 S.Ct. 968 (1959); *Shumate v. State Personnel Board*, 34 Colo.App. 393, 528 P.2d 404 (1974).
- DOC failed to make a written determination that the allegations against Complainant were sustained, inconclusive, that he was exonerated, that the allegations were unfounded, or the investigation was to be continued; to inform him about the general nature of the investigation as soon as practical after the complaint had been received; to inform him of the so-called "pretext phone call" and allow him to review it before being reinterviewed by DOC; and to notify him of the charges giving rise to his termination.
- Complainant was denied due process, the essence of which is basic fairness. *Dekovend v. Board of Education*, 688 P.2d 219 (Colo. 1984).
  - The appointing authority did not read his job description, had no familiarity with his sector of DOC, did not interview his coworkers, knew nothing of his job function.

- Complainant has been accused of attempted bribery by the Attorney General's Office, when it is that office that appears to have engaged in such conduct by communicating with and offering employment to the presiding ALJ, in violation of the Rules of Professional Conduct.
- "The AG's conduct poisoned this case beyond repair, and its failure to provide the Board with any information about screening measures absolutely disqualifies it from further participation in this matter."
- The AG's conduct caused extreme prejudice to Complainant: he had to fund the cost of transcript preparation from the first part of the hearing, endure broken promises from the ALJs hearing his case, pay greatly expanded attorney fees, and endure an appeals process for more than a year.
- ALJ Norwood's conduct prejudiced Complainant by not restarting the hearing, not listening to the tape of the first two days of hearing, not allowing Complainant to make an opening statement.

B. Jeanette E. Aragon v. Department of Corrections, San Carlos Correctional Facility, State Personnel Board case number 2003B223.

On May 6, 2004, the Administrative Law Judge issued an Order Denying Motions for Attorney Fees and Costs, Vacating June 1, 2004 Hearing, and Dismissing Appeal. The ALJ found that C.R.S. § 24-50-125.5 mandates an award of attorney fees and costs "upon final resolution of any proceedings" concerning an appeal of a "personnel action," upon certain specific evidentiary findings. The statute applies only after an evidentiary hearing has concluded on an appeal of a personnel action. Complainant seeks review of Respondent's disciplinary action, which was rescinded, resulting in Complainant's disciplinary action being dismissed as moot.

The ALJ found that neither party alleged that the other party engaged in conduct sanctionable under Rule 37. The only conduct of concern to the Administrative Law Judge was conduct relative to the events surrounding the October 16, 2003 depositions. C.R.C.P. 37 governs sanctions for discovery abuse. Upon review of information submitted by both parties, neither party alleged such misconduct. ALJ denied both parties' motions for attorney fees, vacated the hearing set for June 1, 1004, and dismissed the case with prejudice.

Complainant appealed the ALJ's decision, and filed an Opening Brief on August 20, 2004, arguing the following:

- The issues are: whether Complainant is entitled to judgment after Respondent withdraws a disciplinary action on the "eve of depositions" and four months after a corrective action is rescinded based on identical facts, and when both parties claim attorney fees and costs following the resolution of the merits without the need of an evidentiary hearing, whether the Board lacks subject matter jurisdiction over the claims for fees and costs.
- Complainant has taken no action justifying or excusing the treatment she has suffered at DOC's hands; her reputation and her position were attacked after she made a written negative statement about her supervisor.
- Complainant is entitled to entry of judgment in her favor and against DOC on the disciplinary action; only then will she be afforded the opportunity to gain relief since (1) DOC acknowledged the disciplinary action could not stand; (2) DOC was estopped from contending that her conduct warranted disciplinary action by rescinding the June 6, 2003 corrective action; and (3) DOC should be ordered not to take any further actions against her.
- Complainant is entitled to a hearing and an award of attorney fees and costs under the statute and Board rules. C.R.S. §24-50-125.5.

- The ALJ's interpretation of the attorney fees and costs statute is erroneous; an award of fees and costs may be made even without holding an evidentiary hearing on the merits. Here, there was a final resolution of a proceeding, and the disciplinary and corrective actions taken against Complainant were instituted frivolously, in bad faith, maliciously, or as a means of harassment or were otherwise groundless. See also Board Rule R-8-38.
- The statute contains no requirement that an evidentiary hearing be conducted on the merits of the appeal before an award of attorney fees be made. It is wrong to read such a requirement into the statute. *People v. Gustan*, 183 Colo. 105, 106, 515 P.2d 109, 110 (Colo.App. 1973).
- A willful disregard of the law is bad faith. *Mayberry v. University of Colorado Health Sciences*, 737 P.2d 427, 430 (Colo.App. 1987).

Complainant should be awarded her litigation expenses, and a hearing should be ordered to determine the amount of the award.

On September 21, 2004, Respondent filed its Answer Brief, stating that:

- Complainant's appeal was properly dismissed as moot. *People v. Espinoza*, 819 P.2d 1120 (Colo.App. 1991). She received the relief she requested.
- Compromises and offers to compromise are not admissions of liability. *Silva v. Basin Western, Inc*., 47 P.3d 1184, 1190 (Colo.App. 2002).
- "The decision to rescind the disciplinary action was made to remove the burden of continuing litigation and to encourage the smooth operation of the dental clinic."
- A litigant has the right to settle his or her own case in good faith. *Nichols v. Orr,* 166 P. 561 (Colo. 1917). However, the ALJ found that DOC had not confessed error.
- Complainant's argument that DOC should be collaterally estopped from contending that her behavior warranted disciplinary action when DOC rescinded the previous corrective action is a new argument, not properly before the Board, giving the ALJ no opportunity to rule on it.
- Because the case was properly dismissed as moot, there is no case or controversy over which the Board maintains jurisdiction.
- Complainant is not entitled to attorney fees under the concept of frivolous personnel action (one that is found to proffer no rational argument based on law or evidence) because the underlying action was in no way frivolous, harassing, in bad faith, or groundless. *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984).
- Complainant's failure to secure the missing scissors and account for dental blades constitute a serious breach of security.
- After briefing, the ALJ determined there was no legal or factual basis for an award of fees.
- Complainant's appeal was dismissed and there was no hearing, summary judgment or verdict; thus, there was no final resolution of any proceeding over which the Board had jurisdiction.
- No case law supports her proposition that attorney fees could be awarded in her particular case.
- In addition, the ALJ denied attorney fees because there was no factual basis to support a finding that either party had engaged in sanctionable conduct.
- A party that continues to litigate a claim after the claim has become groundless does so at its own peril. *Western United Realty, Inc. v. Isaacs, supra.*
- Complainant should not be rewarded for stubbornly litigious behavior; DOC requests that the Board affirm the ALJ's order denying attorney fees.

On September 27, 2004, Complainant filed a Reply Brief, asserting that:

- Entry of judgment is necessary to provide complete, make-whole relief. *Lanes v. O'Brien*, 746 P.2d 1366, 1373 (Colo.App. 1987); *Department of Health v. Donahue*, 690 P.2d 2243 (Colo. 1984).
- If judgment were entered, Complainant could seek an order prohibiting DOC from taking any further action against her based on the events of April 25, 2003; judgment would foster her claim for attorney fees and costs; judgment would assure DOC's conduct does not escape review and subject employees to abuse.
- Withdrawal of the disciplinary action was not part of a settlement of Complainant's appeal; it was a *fait accompli* and had it occurred earlier, fees and costs could have been avoided, as the ALJ found.
- DOC relies on the affidavit of Madline SaBell to support its assertion that the disciplinary action was withdrawn to remove the burden of continuing litigation and to encourage the smooth operation of the dental clinic. However, Complainant suffered injury from the delay in the withdrawing the disciplinary action.
- The late withdrawal of the disciplinary action was unlawfully motivated.
- Complainant is entitled to attorney fees and costs because DOC admitted it had no factual basis for taking any actions against Complainant: DOC concluded Complainant did not violate the tool control policy, DOC could not identify any procedures for which Complainant received training with which she did not comply, DOC's actions had no basis in fact.
- The ALJ did not hold that no factual basis existed for denying Complainant attorney fees and costs but held that the Board lacked jurisdiction; however, the Board has jurisdiction and the facts compel an award.
- Jurisdiction was not lost on Complainant's claim for attorney fees simply because the claim concerning the disciplinary action was resolved.
- The statute expressly states that upon final resolution of the personnel action, a claim for attorney fees and costs should be determined. §24-50-125.5.
- Final resolution may be achieved after one party concedes an error on the merits, when summary judgment is entered or when some other dispositive motion is granted.
- DOC acted in bad faith by not acting sooner. *In the matter of Estate of Becker*, 68 P.3d 567, 569 (Colo.App. 2003).
- DOC was stubbornly litigious and acted vexatiously, conduct which supports an award of attorney fees. *Mayberry v. University of Colorado Health Sciences*, 737 P.2d 427, 430 (Colo.App. 1987).
- Replacing a disciplinary action with a second corrective action violates the law, Board Rule R-6-5, and DOC should have known this.
- The statute governing the award of attorney fees mandates a hearing, which will provide incentive not to engage in misconduct and protect Complainant.
- The attorney fee provision of the APA serves the purpose of encouraging employees to appeal personnel actions taken in bad faith and in willful violation of clearly established legal principles; to deny Complainant attorney fees will punish her for bringing this action without which she would have suffered from an unlawfully motivated and improperly based disciplinary action. *See Mau v. E.P.H. Corp.*, 638 P.2d 777, 779 (Colo. 1982).

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

A. Barbara Schwartz v. Department of Corrections, State Personnel Board case number 2004G048.

Complainant petitions the Board to grant a discretionary, evidentiary hearing to review Respondent's termination of Complainant's probationary employment for unsatisfactory performance. Complainant challenges Respondent's termination on the basis that she did not fully disclose information concerning a medical condition that would affect her

ability to complete required training for a Correctional Officer position. Complainant requests that the Board reinstate her to a position as Corrections/Youth/Clinical Security Officer Intern and in the alternative requests three months salary and that her personnel record be restored to reflect she voluntarily separated from employment with Respondent.

Respondent argues that as a probationary employee, Complainant was required to successfully complete Basic Training in order to continue employment with Respondent. Complainant was terminated based on her unwillingness to complete mandatory training in Pressure Point Control Tactics (PPCT). During the course of PPCT training, Complainant informed the instructor of past damaged nerves on the right side of her neck and that a hit on that side would cause pain and that she would experience excruciating pain and could not bear an instructional strike to her right or left side of her neck or head. Complainant had not disclosed this condition on any documents when submitting her application for the position of a Correctional Officer. Respondent states PPCT training is necessary to complete without any conditions or restrictions and Complainant's unwillingness to bear an instructional strike to her right or left side of the neck or head could be a serious weakness point in a "real life" confrontational situation.

The Director concludes that the proffered evidence indicates Complainant has not made the requisite showing to merit a hearing. The uncontroversial evidence shows that in connection with Complainant's application for a position as a Corrections/Youth/Clinical Security Officer Intern, Complainant completed various forms, including a Pre-Employment Supplemental Application, Examination Willingness and Ability Form and Certification of Agreement to Disclose Information and To Tell the Truth, which provides that all employees of Respondent will attend mandatory Basic Training Academy and must successfully complete the required curriculum and failure to do so may result in termination of employment. Complainant acknowledged and agreed to adhere to the condition.

The Director further concludes that while Complainant argues she did not know her employment was contingent on successful completion of Basic Training, including PPCT and that she was not advised PPCT techniques would be used in training, and that Respondent misinterpreted her condition and ability to complete Basic Training, the evidence is clear that Complainant acknowledged in the application process that her continued employment was contingent on successful completion of training. Complainant further acknowledged she had no condition or restriction that would preclude her from successfully completing the course. Complainant obtained signatures of a doctor to certify her ability to perform the function and techniques relative to Basic Training and PPCT.

On September 15, 2004, a Preliminary Recommendation of the Director was issued, recommending that Complainant's petition for hearing be **denied.**

B. Melonie Y. Wilson v. Regents of the University of Colorado, University of Colorado at Colorado Springs and University of Colorado at Boulder, State Personnel Board case number 2003G074.

Complainant petitions the Board to grant a discretionary, evidentiary hearing to review Respondent's termination Complainant's probationary employment for unsatisfactory performance. The Complainant argues the decision to terminate her employment was arbitrary and capricious because it was a violation of law due to discrimination based on race and the right to receive equal treatment in the workplace.

Complainant argues that due to a lack of guidance and training, she was forced to turn in incomplete work. During her employment Complainant contends she received no formal

training manuals or training records for payroll adjustments. Complainant states that she requested a manual and was told that she would receive one, but contends she never did receive a training manual. Complainant argues Respondent's failure to timely provide a copy of payroll adjustment errors or a training manual was an intentional and discriminatory act to contribute to Complainant's failure to perform job and correct errors.

Complainant request reinstatement to her previous position with immediate certification, back pay with all pay increases and benefits, administrative action taken against all parties found responsible for illegal discriminatory actions and compensation for damages and hardship suffered as a result of termination.

Respondent argues that Complainant's petition for hearing be denied and argues Complainant's failed to meet the burden of showing valid issues exist that merit an evidentiary hearing and in no way did Respondent discrimination against Complainant. Respondent argues that Complainant was terminated from employment as a result of poor job performance and not as a result of alleged discrimination. Respondent acted in accordance with Board Rules R-7-1, R-4-9 and R-4-10. In addition to denial of hearing, Respondent requests sanctions for Complainant's failure to provide a copy of her information sheet to Respondent.

The ALJ concludes that Complainant failed to make a *prima facie* case of discrimination. Complainant does not allude to the nondiscriminatory treatment of other non-minority employees and merely states that other similarly situated employees were treated differently by being given training opportunities by being provided access to the "N" drive, access database and research. The ALJ further finds that Complainant's performance demonstrates she was unable to perform her duties in a satisfactory manner, despite repeated corrections, close monitoring and training for improvement. Complainant was unable to improve sufficiently to gain certification. Respondent's decision to terminate employment was a business decision and is completely unrelated to her race/color/creed.

On September 23, 2004, a Preliminary Recommendation of the Administrative Law Judge was issued, recommending Complainant's petition for hearing be **denied,** and further that Respondent's request for sanctions against Complainant be **denied.**

C. Don Vadasy v. Department of Transportation, State Personnel Board case number 2004G072.

Complainant petitions the Board to grant a discretionary, evidentiary hearing to review Respondent's denial of his grievance. Complainant contends that the final grievance decision was arbitrary and capricious because he was denied the "hard to fill" pay rate to which he is entitled, and that the denial of "hard to fill" pay for the period from December 2002 (when Region I, Section 5, Patrol 35 was designated as "hard to fill") until July 1, 2003, constitutes an unfair and unequal pay practice.

Complainant held a position as a TMW I in Region I, Section 5, Patrol 1535 since at least July 2002, with his pay in August 2002 at $2,602.00 per month. Complainant contends that at least one new employee was hired to fill a position in Complainant's patrol in December 2002 at the "hard to fill" rate of $2,724.00 per month. Complainant argues he did not receive the applicable "hard to fill" rate until July 1, 2003. Complainant requested reimbursement of back "hard to fill" pay in his step one grievance, which was denied by Respondent. Complainant states Respondent's failure to pay proper "hard to fill" rate upon designation of his work location as "hard to fill" and its refusal to reimburse him for improperly denied pay was arbitrary, capricious and a violation of DOT policies and procedures. Complainant seeks reimbursement of "hard to fill" pay for ten months, from September 1, 2002 – July 1, 2003, in the amount of $1,220.00, plus interest and attorney fees and costs.

Respondent argues that Complainant failed to meet his burden of proof showing valid issues exist that merit a hearing. First, Complainant's co-worker received the same pay based upon the $2,602.00 "hard to fill" pay rate that was approved in October 2002. Respondent agrees that Complainant's pay rate in August 2002 was $2,602.00 per month, and that his position was requested to be paid at a "hard to fill" rate on August 27, 2002. Respondent argues that Complainant incorrectly alleged an unidentified employee was hired to fill a position in Complainant's patrol in December 2002 at the rate of $2,724.00 per month. Respondent provided Complainant with every "hard to fill/ retain" wage increase that was approved for his position, and Complainant's payroll history confirms that in December 2002 and January 2003 his paycheck was in the amount of $2,566.00 because Complainant should have been earning $2,602.00 since October 9, 2002; payroll records reflect the history, and a correction was made to his February 28, 2003 paycheck. Complainant has received the full $2,602.00 for February 2003, plus a separate check in the amount of $134.72 to make up the error in underpayment of $26.72 for October 9-31, 2002, and $36.00 per month for November and December 2002, and January 2003. The payroll history also confirms Complainant received $2,602.00 for each paycheck issued in March, April, May, and July 2003.

Respondent states Complainant has presented no evidence that the hard to fill/hard to retain rate was ever approved at $2,724.00 in December 2002, and no evidence that anyone received $2,724.00 prior to July 1, 2003. The only evidence is that the rate was changed to $2,602.00 effective October 9, 2002, and requests that Complainant's petition for hearing be denied.

The ALJ concludes that Complainant failed to demonstrate that if a hearing was granted, he could prove disparate treatment in wages between himself and his co-worker or any other DOT employee. Complainant and the co-worker received the exact same salary from December 2002 to July 1, 2003, in the amount of $2,602.00 per month.

On September 28, 2004, a Preliminary Recommendation of the Administrative Law Judge was issued, recommending that Complainant's petition for hearing be **denied.**

D. Richard Sickles v. Department of Public Health and Environment, Water Quality Control Division, State Personnel Board case number 2004G059.

Complainant petitions the Board to grant a discretionary, evidentiary hearing to review Respondent's final grievance decision. Complainant alleges his first line supervisor failed to comply with Board Rule R-6-6 and R-6-8 in issuing a corrective action and argues Respondent's blanket policy prohibiting the removal of corrective actions from personnel files, unless required by other proceedings, is in direct violation of R-6-8.

Complainant argues that Respondent failed to allow him an opportunity to provide information prior to issuing and serving Complainant with a corrective action. Further he argues the Rule necessarily requires the appointing authority to provide the employee an opportunity to present information prior to issuance of a corrective action. Complainant contends that providing him an opportunity to be heard may have allowed him to explain the procedures he followed and the problems that existed between himself and his co-worker, and believes it could have eliminated the need to proceed through the grievance process.

DPA's "Technical Assistance- Corrective and Disciplinary Actions" states that an appointing authority has the discretion to remove a corrective action for the employees personnel file at any time. A blanket policy may not be used to summarily usurp the appointing authority's power to give or remove corrective actions. Complainant requests rescission of the corrective action and or an order requiring Respondent to rescind the corrective action and allow Complainant an opportunity to provide information prior to

Respondent reaching a decision concerning issuance of a corrective action.

Respondent argues that Complainant failed to meet his burden of showing valid issues exist that merit an evidentiary hearing. First, Complainant has not challenged the factual basis for the final grievance decision. Next, there is no regulatory requirement to provide Complainant with a pre-corrective action opportunity to be heard and, finally the appointing authority's discretion to remove the corrective action has not been changed.

Respondent contends misconduct occurred on two instances on November 10, 2003, that resulted in the corrective action issued November 13, 2003. Complainant interrupted a meeting of DPHE employees and publicly scolded a co-worker in an intimidating, disrespectful and disruptive manner, and failed to follow data-processing procedures by not properly identifying and processing a coliform-positive sample result. Complainant has not challenged the factual basis for DPHE's final grievance decision although he alleges the corrective action was procedurally defective because he was not allowed an opportunity to be heard.

Respondent argues that Rule R-6-6 provides for information presented by the employee must be considered; however, the provision does not set forth any affirmative obligation on the agency's behalf to solicit such information, and the guidelines do not contain any provision stating the agency must provide an opportunity for employees to present information. In the final grievance decision, Complainant was granted the opportunity to have to corrective action removed from his personnel file, conditional upon Complainant's compliance with the requirements of the corrective action. The appointing authority has exercised his discretion in providing a means for the removal of this action. There is no legal requirement to provide a process by which a corrective action is removed.

The ALJ concludes that Board Rule R-6-6 mandates that if the supervisor issuing the corrective action is in receipt of information presented by the employee, that information must be considered prior to issuing the corrective action. The Rule does not require supervisors to discuss an impending corrective action prior to its issuance. Board Rule R-6-10 does require such a meeting prior to imposing disciplinary action. The ALJ finds that the appointing authority did not violate R-6-6; however, the appointing authority bypassed what could have been a meaningful opportunity to develop trust and loyalty of her subordinate. The appointing authority informed Complainant of this corrective action via email, which demonstrates a lack of tact and diplomacy.

Complainant's argument regarding the removal of the corrective action from his personnel file is moot and lacks standing to raise it. An action is moot when a judgment, if rendered, would have no practical legal effect upon an existing controversy. Complainant received the outcome of his request: removal of the corrective action after a period of time with no further violations. Board Rule R-6-8 does not create a legally protected interest in the removal of a corrective action; it states that agencies "may" include language on removal in their corrective actions, but does not mandate such language.

On September 30, 2004, a Preliminary Recommendation of the Administrative Law Judge was issued, recommending that Complainant's petition for hearing be **denied.**

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

A. Barbara Clementi v. Department of Corrections, State Personnel Board case number 2003B159.

Complainant, a Community Corrections Parole Officer, appealed Respondent's layoff due to lack of funds. On May 5, 2003, Complainant was notified of the layoff to which the Complainant objected on grounds of her seniority in state service. Complainant was then informed that her seniority would be taken into account and consideration during the retention rights process. On June 3, 2003, Complainant was given notice of retention rights. Complainant objected to the retention rights because she believed an encumbered position listed was located at Arkansas Valley Correctional Facility, outside a 50-mile radius of her position, rather than inside a 50-mile radius. Complainant was offered new retention rights on June 13, 2003, which Complainant elected to accept, an encumbered Case Manager I position at Centennial Correctional Facility located in Canon City. Complainant declined an encumbered Community Parole Officer position located in Denver. Complainant noted on her retention rights election form that the process that had been utilized is illegal and not in compliance with personnel rules. Complainant accepted a position in a lower class of jobs at DOC in the Case Manager Series because the pay grade is lower than that of the PCCO class. Complainant was paid same rate in her new position after exercising her retention rights.

Complainant alleges Respondent's layoff was discriminatory on the basis of national origin, Respondent's offer of retention rights was in violation of Board rules governing retention rights, Respondent retaliated against Complainant by violating the Colorado Anti-Discrimination Act, and Complainant should be entitled to an award of attorney fees and costs. Complainant was reinstated in her position and therefore received part of the relief sought. Respondent moved to dismiss this matter based on reinstatement and moved for summary judgment on Complainant's request for attorney fees and costs. Respondent also moved for an award of attorney fees and costs against Complainant based on continued prosecution of this matter after reinstatement. The ALJ granted the motion to dismiss Complainant's remaining substantive claims of discrimination, retaliation and her challenge of retention rights on grounds of mootness. The ALJ denied Respondent's motion for summary judgment and Complainant's request for attorney fees and costs and determined that issues of material fact existed as to whether an award of attorney fees and costs was mandated by statute.

The ALJ found that Respondent had no record or evidence of the decision-making process regarding the determination that the layoff statute and rules do not apply to the May 2003 RIF. No witnesses for Respondent provided explanation on how this layoff decision was reached, who was involved in decision making, what reasoning process was utilized, or who made the ultimate decision. No one at DOC sought the advice of legal counsel regarding the agency's decision to violate the state layoff statute and Board layoff rules by ignoring seniority in state service and performance in the layoff process.

The ALJ found Respondent's layoff of Complainant was contrary to rule and law, Respondent violated the layoff statute and failed to use time bands to determine seniority based on total state service and failed to make layoff decision based on use of those time bands, Respondent's actions were arbitrary and capricious, Respondent willfully disregarded the law governing layoffs in implementing its May 2003 RIF, Respondent refused to use reasonable diligence to procure such evidence as it was required by law to consider in exercising its discretion, and Respondent refused to comply with statute and rules and failed to obtain legal advice regarding its discretion. The ALJ ordered that Respondent's action be rescinded and Respondent is to reinstate Complainant to her PCCO class position, retroactive to July 1, 2003, in order that she may utilize that service for future promotions and other personnel-related purposes. The ALJ granted Complainant's motion for attorney fees and costs, and ordered Respondent to pay Complainant attorney fees and costs and to reimburse Complainant in the amount of $3666.00 for travel costs incurred due to the illegal layoff by Respondent. The ALJ denied Respondent's motion for attorney fees and costs.

[The deadline for appealing the Initial Decision of the Administrative Law Judge is October 18, 2004.]

VI. REVIEW OF THE MINUTES FROM THE SEPTEMBER 21, 2004 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS SEPTEMBER 21, 2004 PUBLIC MEETING:

A. Barbara Mickens v. Department of Corrections, Limon Correctional Facility, State Personnel Board case number 2003G076(C).

The Board voted that the Preliminary Recommendation of the Director be adopted, and that a hearing on Complainant's claims of age, race, and gender discrimination be denied; that a hearing on Complainant's claim of hostile work environment be denied; and that a hearing on Complainant's claim of retaliation, and arbitrary and capricious conduct by Respondent be granted.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Budget Reports and Revenue and Expense Report
- Cases on Appeal to the Board and to Appellate Courts
- Cases Scheduled for Preliminary Review
- Web Site Statistics
- Mandate/Order Affirmed in Koinis v. Department of Public Safety, State Personnel Board Case No. 2001B082, Court of Appeals No. 02CA1631

B. OTHER BOARD BUSINESS

- [Informational] Director's Report on joint Rules Revision Project.

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

X. EXECUTIVE SESSION

A. Case Status Report

NEXT REGULARLY SCHEDULED BOARD MEETINGS - 9:00 a.m.

November 16, 2004	**Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222**
December 21, 2004	**Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222**
January 18, 2005	**Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222**
February 15, 2005	**Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222**
March 15, 2005	**Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222**
April 19, 2005	**Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222**
May 17, 2005	**Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222**
June 21, 2005	**Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222**